



4312-EJ

## DEPARTMENT OF THE INTERIOR

### National Park Service

#### 36 CFR Part 12

[NPS-WASO-REGS-13553]

[PXXVPAD0515]

RIN 1024-AE01

### National Cemeteries, Demonstration, Special Event

**AGENCY:** National Park Service, Interior.

**ACTION:** Proposed rule.

**SUMMARY:** The National Park Service is proposing to revise the definition of the terms *demonstration* and *special event*, applicable to the national cemeteries administered by the National Park Service.

**DATES:** Comments must be received by [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

**ADDRESSES:** You may submit your comments, identified by Regulation Identifier Number (RIN) 1024-AE01, by any of the following methods:

- Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.
- Mail to: A.J. North, Regulations Program, National Park Service, 1849 C Street, NW, MS-2355, Washington, DC 20240.

Instructions: All submissions received must include the agency name and RIN for this rulemaking. All comments received will be posted without change to

*http://www.regulations.gov*, including any personal information provided. For additional information, see the **Public Participation** heading of the **SUPPLEMENTARY INFORMATION** section of this document.

Docket: For access to the docket to read background documents or comments received, go to *http://www.regulations.gov*.

**FOR FURTHER INFORMATION CONTACT:** A.J. North, National Park Service Regulations Program, by telephone: 202-513-7742 or e-mail: [waso\\_regulations@nps.gov](mailto:waso_regulations@nps.gov).

## **SUPPLEMENTARY INFORMATION:**

### **Background**

The National Park Service (NPS) is responsible for protecting and managing fourteen national cemeteries, which are administered as integral parts of larger NPS historical units. A list of the national cemeteries managed by the NPS may be viewed at <http://www.cem.va.gov/cem/cems/doi.asp>.

The national cemeteries administered by the NPS were established as national shrines in tribute to the gallant dead who have served in the Armed Forces of the United States. These cemeteries are to be protected, managed, and administered as suitable and dignified burial grounds and as significant cultural resources. In 1986, the NPS comprehensively revised the Part 12 rules that govern the NPS administered national cemeteries to comply with Federal statutory law and to update and standardize procedures for the operation of national cemeteries (51 FR 8976, March 14, 1986). As part of this revision, § 12.2 was amended to prohibit “conducting special events and demonstrations, except for official commemorative events on Memorial Day, Veterans

Day, and other dates designated by the superintendent as having special historic and commemorative significance for the particular national cemetery.” As more extensively detailed at 51 FR 8977 (March 14, 1986), this is because these national cemeteries are intended to have a protected atmosphere of peace, calm, tranquility, and reverence where there is “a substantial governmental interest that exists in maintaining this protected atmosphere where individuals can quietly contemplate and reflect upon the significance of the contributions made to the nation by those interred.”

The term *demonstration* was added to § 12.3 and defined to mean “a demonstration, picketing, speechmaking, marching, holding a vigil or religious service or any other like form of conduct that involves the communication or expression of views or grievances, whether engaged in by one or more persons, that has the intent, effect or likelihood to attract a crowd or onlookers. This term does not include casual park use by persons that does not have an intent or likelihood to attract a crowd or onlookers.”

The term *special event* was also added and defined as “a sports event, pageant, celebration, historical reenactment, entertainment, exhibition, parade, fair, festival or similar activity that is not a demonstration, whether engaged in by one or more persons, that has the intent, effect or likelihood to attract a crowd or onlookers. This term does not include casual park use by persons that does not have an intent or likelihood to attract a crowd or onlookers.”

#### *Concerns over the Definition of the Term “Demonstration”*

In *Boardley v. Department of the Interior*, 605 F.Supp. 2d 8 (D.D.C. 2009), the United States District Court for the District of Columbia noted that the NPS’s definition of the term *demonstration* in 36 CFR 2.51(a) and 7.96(g)(1)(i) could pose a problem on

the scope of the agency’s discretion, insofar as it could be construed to allow NPS officials to restrict speech based on their determination that a person intended to draw a crowd with their conduct. The NPS had not applied, nor intended to apply, its regulations in an impermissible manner. Nevertheless, to address the District Court’s concerns in *Boardley*, the NPS narrowed the definition of *demonstration* in an interim general rule governing demonstration and the sale and distribution of printed matter for most of the National Park System (75 FR 64148, Oct. 19, 2010). This rule was amended and finalized on June 24, 2013 (78 FR 37713). In response to *Boardley*, the NPS also issued a final rule that narrowed the NPS’s National Capital Region definition of *demonstration* at § 7.96 (78 FR 14673, March 7, 2013).

The new definition of *demonstration* in 36 CFR 2.51 and 7.96 provided a “reasonably likely” standard – rather than an “effect, intent or propensity” standard – to ensure the necessary objectivity in the regulatory process, while negating the possibility of a permit being granted or rejected on impermissible grounds. The NPS also determined that the “reasonably likely” standard is easily and consistently understood.

### **Proposed Rule**

The national cemeteries administered by the NPS have been set aside as resting places for members of the fighting forces of the United States. Many activities and events that may be appropriate in other park areas are inappropriate in a national cemetery because of its protected atmosphere of peace, calm, tranquility, and reverence. The NPS continues to maintain its substantial interest in maintaining this protected atmosphere in its national cemeteries, where individuals can quietly visit, contemplate, and reflect upon

the significance of the contributions made to the nation by those who have been interred there.

The NPS also desires to maintain consistency in the regulations governing demonstrations and special events in park units, including national cemeteries. Accordingly, the proposed amended definition of the term *demonstration* in § 12.3 would mirror the language now used 36 CFR 2.51 and 7.96. The proposed amended definition of the term *special event* in § 12.3 would also contain nearly identical language. To avoid the possibility of a decision based on impermissible grounds, the proposed rule would revise the § 12.3 definitions of *demonstration* and *special event* by eliminating the terms “intent, effect, or likelihood” and replacing them with the term “reasonably likely to draw a crowd or onlookers.” While these proposed revisions would not substantively alter the § 12.4 prohibition of special events and demonstrations within national cemeteries, it would more clearly and consistently define these terms.

### **Compliance with Other Laws, Executive Orders, and Department Policy**

*Regulatory Planning and Review (Executive Orders 12866 and 13563).*

Executive Order 12866 provides that the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget will review all significant rules. OIRA has determined that this rule is not significant.

Executive Order 13563 reaffirms the principles of Executive Order 12866 while calling for improvements in the nation’s regulatory system to promote predictability, to reduce uncertainty, and to use the best, most innovative, and least burdensome tools for achieving regulatory ends. The executive order directs agencies to consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the

public where these approaches are relevant, feasible, and consistent with regulatory objectives. Executive Order 13563 emphasizes further that regulations must be based on the best available science and that the rulemaking process must allow for public participation and an open exchange of ideas. We have developed this rule in a manner consistent with these requirements.

*Regulatory Flexibility Act (RFA).*

This rule will not have a significant economic effect on a substantial number of small entities under the RFA (5 U.S.C. 601 *et seq.*).

*Small Business Regulatory Enforcement Fairness Act (SBREFA).*

This rule is not a major rule under 5 U.S.C. 804(2), the SBREFA. This rule:

- (a) Does not have an annual effect on the economy of \$100 million or more.
- (b) Will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions.
- (c) Does not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises.

*Unfunded Mandates Reform Act (UMRA).*

This rule does not impose an unfunded mandate on State, local, or tribal governments or the private sector of more than \$100 million per year. The rule does not have a significant or unique effect on State, local or tribal governments or the private sector. It addresses public use of national park lands, and imposes no requirements on other agencies or governments. A statement containing the information required by the UMRA (2 U.S.C. 1531 *et seq.*) is not required.

*Takings (Executive Order 12630).*

This rule does not affect a taking of private property or otherwise have taking implications under Executive Order 12630. A takings implication assessment is not required.

*Federalism (Executive Order 13132).*

Under the criteria in section 1 of Executive Order 13132, the rule does not have sufficient federalism implications to warrant the preparation of a Federalism summary impact statement. This proposed rule only affects use of NPS administered lands and waters. It has no outside effects on other areas. A Federalism summary impact statement is not required.

*Civil Justice Reform (Executive Order 12988).*

This rule complies with the requirements of Executive Order 12988. Specifically, this rule:

- (a) Meets the criteria of section 3(a) requiring that all regulations be reviewed to eliminate errors and ambiguity and be written to minimize litigation; and
- (b) Meets the criteria of section 3(b)(2) requiring that all regulations be written in clear language and contain clear legal standards.

*Consultation with Indian tribes (Executive Order 13175 and Department Policy).*

The Department of the Interior strives to strengthen its government-to-government relationship with Indian tribes through a commitment to consultation with Indian tribes and recognition of their right to self-governance and tribal sovereignty. We have evaluated this rule under the Department's consultation policy and under the criteria in Executive Order 13175 and have determined that it has no substantial direct effects on

federally recognized Indian tribes and that consultation under the Department's tribal consultation policy is not required.

*Paperwork Reduction Act (PRA)(44 U.S.C. 3501 et seq.).*

This rule does not contain information collection requirements, and a submission to the Office of Management and Budget under the PRA is not required.

*National Environmental Policy Act (NEPA).*

This rule does not constitute a major Federal action significantly affecting the quality of the human environment. A detailed statement under the NEPA of 1969 is not required because we have determined the rule is categorically excluded under 43 CFR 46.210(i) because it is administrative, legal, and technical in nature. We have also determined that the rule does not involve any of the extraordinary circumstances listed in 43 CFR 46.215 that would require further analysis under NEPA.

*Effects on the Energy Supply (Executive Order 13211).*

This rule is not a significant energy action under the definition in Executive Order 13211. A Statement of Energy Effects is not required.

*Clarity of this rule.*

We are required by Executive Orders 12866 (section 1(b)(12)) and 12988 (section 3(b)(1)(B)) and by the Presidential Memorandum of June 1, 1998, to write all rules in plain language. This means that each rule we publish must:

- (a) Be logically organized;
- (b) Use the active voice to address readers directly;
- (c) Use clear language rather than jargon;
- (d) Be divided into short sections and sentences; and



(e) Use lists and tables wherever possible.

If you feel that we have not met these requirements, send us comments by one of the methods listed in the **ADDRESSES** section. To better help us revise the rule, your comments should be as specific as possible. For example, you should tell us the numbers of the sections or paragraphs that you find unclear, which sections or sentences are too long, the sections where you feel lists or tables would be useful, etc.

**Drafting Information:** The primary author of this regulation was C. Rose Wilkinson, National Park Service, Regulations and Special Park Uses, Washington, D.C.

### **Public Participation**

It is the policy of the Department of the Interior, whenever practicable, to afford the public an opportunity to participate in the rulemaking process. Accordingly, interested persons may submit written comments regarding this proposed rule by one of the methods listed in the **ADDRESSES** section. All comments must be received by midnight of the close of the comment period. Bulk comments in any format (hard copy or electronic) submitted on behalf of others will not be accepted.

### **Public availability of comments**

Before including your address, phone number, e-mail address, or other personal identifying information in your comment, you should be aware that your entire comment – including your personal identifying information – may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

## List of Subjects in 36 CFR Part 12

Cemeteries, Military personnel, National parks, Reporting and recordkeeping requirements, Veterans.

In consideration of the foregoing, the National Park Service proposes to amend 36 CFR Part 12 as follows:

### **PART 12—NATIONAL CEMETERIES**

1. The authority citation for Part 12 continues to read as follows:

**Authority:** 16 U.S.C. 1, 3, 9a, and 462(k); E.O. 6166, 6228, and 8428.

2. Revise the part heading as set forth above.

3. Amend § 12.3 by revising definitions of “Demonstration” and “Special event” to read as follows:

#### **§ 12.3 Definitions**

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*Demonstration* means a demonstration, picketing, speechmaking, marching, holding a vigil or religious service, or any other like form of conduct that involves the communication or expression of views or grievances, engaged in by one or more persons, the conduct of which is reasonably likely to attract a crowd or onlookers. This term does not include casual park use by persons that is not reasonably likely to attract a crowd or onlookers.

\* \* \* \* \*

*Special event* means a sports event, pageant, celebration, historical reenactment, entertainment, exhibition, parade, fair, festival, or similar activity that is not a demonstration, engaged in by one or more persons, the conduct of which is reasonably likely to attract a crowd or onlookers. This term does not include casual park use by persons that is not reasonably likely to attract a crowd or onlookers.

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Dated: August 6, 2013

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Rachel Jacobson  
Principal Deputy Assistant Secretary for Fish and Wildlife and Parks

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